MUNYARADZI KEREKE
versus
FRANCIS MARAMWIDZE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 6 & 9 December 2016

BAIL APPLICATION- CHANGED CIRCUMSTANCES

T Mpofu assisted by K Kachambwa, for applicant
C Warara assisted by RG Wenyeve, for respondent

TAGU J: The applicant was convicted by the Regional Magistrates Court at Harare of one count of rape following a private prosecution instituted by the respondent after the Prosecutor-General had declined to prosecute him. He was sentenced to an effective term of imprisonment of 10 years after 4 years imprisonment were suspended for 5 years on the usual conditions of good behaviour. He has appealed against the conviction and sentence. On the 27th September 2016 he filed an application for bail pending appeal with this court. The application was dismissed by ZHOU J on the 7th October 2016. He has now filed another application for bail pending appeal on the basis of a change in his circumstances.

In dismissing the application for bail pending appeal ZHOU J considered the evidence and a number of other issues such as prospects of success on appeal and concluded by saying-

> "In the instant case the offence which the applicant was convicted of is a very serious one. The sentence imposed is quite long. The length of the sentence coupled with the fact that the applicant has already been subjected to the inconveniences of prison life are factors which would induce the applicant to abscond. His conduct which was found by the Learned Magistrate to have been disruptive of the investigations and, in some instances, seeking to manipulate the evidence of potential state witnesses makes his assurances that he will avail himself to complete his sentence if the appeal fails difficult to believe. Thus, while there is no direct evidence that the applicant will abscond, it would be an improper exercise of the court's discretion to ignore the expressed scepticism of the Learned Magistrate regarding innocence of the applicant in the events which ultimately resulted in a delay in the prosecution of the case. The applicant was also not forthcoming as to the immovable properties which he has which could be available as security. There was a suggestion that they were encumbered save for an undivided share in a movable property the full particulars whereof were not either in his draft order or in the submissions made on behalf of the applicant. This court has also noted that the applicant has been very equivocal about the address stated in the draft order. The evidence on record shows that he did not necessarily

> have one residential address. In denying the charge of rape he stated that he was at an address in Mandara. Nothing is said about what became of that residence. Indeed, nothing is also said about the Vainona address at which the offence was committed. It is difficult to ascribe one residential address to the applicant even in the face of his assurance that he used to reside in rented accommodation. That is so because he did not have one residential address, according to the facts highlighted above.
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> The court has also considered that the record of proceedings is now ready. The preparation of the record is one factor that would usually contribute to the delay in the setting down or hearing of an appeal. Since that record has been transcribed the applicant should seek to expedite the determination of his appeal.
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> In all the circumstances, this is a matter in which notwithstanding some unsatisfactory features of the evidence upon which the conviction was predicted the court is of the view that the admission of the applicant to bail at this stage would undermine the administration of justice. The applicant has not shown positive grounds for this court to reach a different conclusion. His right to personal liberty must therefore yield to the need to uphold the proper administration of justice."

I found it necessary to quote the reasons why the applicant was initially denied bail pending appeal in *extenso* because some of the issues raised have a bearing in this application.

This is an application for bail pending appeal on changed circumstances. The application is strongly opposed by the respondent.

Section 116 (c) *proviso* (iii) of the Criminal Procedure and Evidence Act [*Chapter 9.07*] provides that an offender may remake an application for bail based on changed circumstances if-

> "….such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after the determination." See *S* v *Barros & Ors* 2002 (2) ZLR 17 (H) at 20B-C.

For an applicant to succeed in an application for bail based on changed circumstances the applicant must show that the bail application is based on facts which were not placed before the initial judge or magistrate who denied him or her bail which have arisen and or were discovered after the determination.

In casu the applicant submitted that after the dismissal of his bail application pending appeal by ZHOU J two significant developments occurred. The first is that applicant's estranged wife Elizabeth visited him in prison and offered to stand surety for his release on bail. In that connection she offered (i) an immovable property as recognizance, (ii) to accommodate applicant until the finalization of his appeal. The property offered is number 31 Ness Road, Mandara, Harare whose fuller description is 31 Mandara of Lot 14A Mandara

measuring 1.1044 hectares under Deed of Transfer No. 0002515/2006. She further offered to fund any overhead costs that may be incurred in connection with the state implementing any house arrest that may be imposed upon applicant at number 31 Ness Road, Mandara, Harare. Further, and secondly, two other sureties namely Arnold Mandizvidza Chidakwa and Barbarah Chidakwa came forward and offered real security known as a certain piece of land situate in the District of Salisbury called Stand 694 Bannockburn Township of Stand 1 Bannockburn Township, Harare.

The respondent opposed the application and stated among other things that there are no changed circumstances and where such circumstances have been shown these are not sufficient to warrant that the applicant would not abscond if released on bail. In particular the respondent submitted that at the last bail hearing the applicant stated that he had three wives residing at 12 St Andrews Road, Hatfield Harare. He has not said what happened to those wives and wants to abandon them and go and reside with estranged wife he divorced in 2008. The respondent submitted that the applicant cannot be trusted because during trial he stated that he divorced with one Memory and never mentioned that he divorced with Elizabeth whom he claimed resided at 75 Wallis Road Mandara. The wife he said he divorced with was one Josphine Mukarati. The respondent does not understand why Elizabeth wants to rescue him. Besides that the respondent said the said property where Elizabeth wants to keep the applicant under house arrest is a school or crèche where many children are enrolled and this would put the lives of the children at risk given that the applicant was convicted of raping an 11 year of girl at gun point. See *Tito Mwana* v *The State* HH-221-10 at p1.

As to the property offered by Arnold Mandizvidza Chidakwa and Barbara Chidakwa the respondent submitted that the property is not sufficient surety because the value of that stand at Bannockburn Township is not known and may be just a stand lying idle and the applicant may abscond from the jurisdiction of this court once released on bail.

The respondent submitted that the applicant did not offer to surrender his passport to the court despite stating that he has a valid passport and is a well -travelled individual outside the country. Lastly the respondent submitted that while the applicant may have stated what he perceived to be changed circumstances, the applicant did no deal with all the reasons stated by ZHOU J when denying him bail.

However, on the issue of the passport counsel for the applicant Mr *Mpofu* tendered the passport in court and apologized for this oversight.

In the present application I found that indeed the issue of the estranged wife Elizabeth visiting the applicant, if ever it is true at prison after determination and offering her property as security amounts to changed circumstances. I also found that if it is true that Arnold and Barbara Mandizvidza came forward and offered real security after determination of the bail application before ZHOU J this amounts to changed circumstances. The issue of the passport which was only surrendered on the day of the hearing also amounted to some changed circumstances. Same as the proposal to put the applicant on house arrest. However, what I have to decide is whether these circumstances have changed to such an extent that the threat to the due administration of justice should the applicant be granted bail been completely removed or lessened to an insignificant level. This takes me to the reasons for denying applicant bail by ZHOU J.

In the case of *Daniel Range* v *The State* HB-127-04 CHEDA J remarked at p 2 of the cyclostyled judgment that-

> "In determining changed circumstances the court must go further and enquire as to whether the changed circumstances have changed to such an extent that they warrant the release of a suspect on bail without compromising the reasons for the initial refusal of the said bail application."

I totally agree with Mr *Warara* that ZHOU J did not dwell on inadequate security and abode only. He talked of the seriousness of the offence with which the applicant was convicted of. The applicant has not shown what has changed about it. ZHOU J talked about the length of the sentence coupled with the fact that the applicant has already been subjected to the inconvenience of prison life which factors would induce the applicant to abscond. The applicant's conduct of being manipulative and disruptive of investigations which makes his assurances that he will avail himself to complete his sentence if the appeal fails difficult to believe cannot be overlooked. One wonders how an estranged wife divorced from the applicant in 2008 can be best suited to look after the applicant. The submissions by Mr *Warara* left me in no doubt that the address supplied by Elizabeth is her business address where she is running a school or a crèche and it would be dangerous to keep a person convicted of raping a minor under house arrest. ZHOU J also stated in no uncertain terms that the applicant was not forthcoming as to the immovable properties which he could avail as security. The Judge ruled that the evidence on record shows that the applicant did not have one residential address. In the event of him absconding to any one of them it would be difficult to locate him. The fact that the Registrar of the High Court has not called for heads is

in my view not a changed circumstance. ZHOU J clearly said that the record was ready at the last bail hearing and the applicant was asked to expedite the determination of his appeal.

As regards the surrendering of the passport, in my view this alone is not a guarantee that the applicant will not abscond given the porous nature of our borders and the fact that applicant has external connections in the sense that he is a widely travelled man.

In my view, while it is true that the provision of security by Elizabeth and the Chidakwas, as well as the surrendering of the passport represented changed circumstances, these alone are not compelling reasons to release applicant on bail. From the facts alleged, it seems to me that the applicant is a flight risk and must prosecute his appeal while serving. The application fails.

In the result, the application for bail on changed circumstances pending appeal is hereby dismissed.

Mutandiro, Chitsanga & Associates, applicant's legal practitioners
Warara & Associates, respondent's legal practitioners